STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. BAR-04-5

BOARD OF OVERSEERS OF THE BAR	)	
	)	
Plaintiff	)	
v.	)	DECISION AND ORDER
	)	
THOMAS F. ADAMS	)	
	)	
Respondent	)	

This matter was heard by the Court on January 19, 2005, on an information filed by the Board of Overseers of the Bar against Thomas F. Adams, Esq. alleging professional misconduct both during and following his representation of Christopher V. and Mariah Lancaster and their business, Presque Isle Glass, Inc., a sub-chapter S corporation. The Board was represented by Assistant Bar Counsel Geoffrey S. Welsh and the defendant was represented by Kevin M. Cuddy, Esq. Board Exhibits 1-12, 14-15, 17, 19-20, and 22-30 and Defendant Exhibits 1, 2 and 15 were admitted without objection.

At the hearing, the Court heard testimony from Mr. Adams, Mr. Lancaster, Mr. Lancaster's former father-in-law, James F. Pritchard, and Galen Rockwell, a Certified Public Accountant practicing in Caribou. Based on its review of the exhibits admitted and the testimony of the above witnesses and after review of the

post-trial briefs submitted by counsel, the Court finds the following facts and draws the following conclusions:

I. FINDINGS

Thomas F. Adams, Esq. has a bachelor's degree in accounting and a master's degree (LLM) in taxation. He is a member of the Maine Bar. Since approximately 1995, one of his clients has been James F. Pritchard of Chapman, Maine, for whom Adams has been preparing tax returns and doing real estate closings. In 1999 Pritchard suggested that his son-in-law, Christopher V. Lancaster, also seek Adams advice. Thereafter Adams began advising Christopher V. and Mariah P. Lancaster in connection with first acquiring from Portland Glass, where Christopher had been working, their Presque Isle facility. When that did not happen, Adams helped them establish their own business, Presque Isle Glass. Adams reviewed Christopher's employment contract with Portland Glass and formed Presque Isle Glass, Inc. (a sub-chapter S corporation owned by the Lancasters). After Christopher negotiated a loan commitment of $25,000 from First Citizens Bank secured by personal guarantees from the Lancasters and Mariah's parents, the Pritchards, a second mortgage on the Lancasters' home and a mortgage on rental property owned by the Pritchards, Adams drafted the loan documents and the guarantee documents, and closed the loan. Adams assumed without discussing or memorializing that his clients' consented to any conflicts he

might have in connection with this loan transaction. Later Adams represented Presque Isle Glass in a trademark infringement claim by Portland Glass. As a result of that claim, Presque Isle Glass ceased doing business on August 16, 2000 after forty-two days of operation.

In early 2001 Lancaster asked Adams to prepare both the corporation's and his and Mariah's 2000 personal income tax returns and to put them through bankruptcy. Presque Isle Glass, Inc. had a 2000 operating loss of $28,198 which, Adams advised, could be flowed through to the Lancasters' personal return, resulting in a $7000 tax refund. Among other debts, the Lancasters intended to reaffirm the First Citizens Bank debt because Mariah's parents had guaranteed it. The plan that Adams had devised was to use the tax refund to restructure the $25,000 First Citizens Bank loan.

Before filing the bankruptcy petition, Mariah privately confided to Adams of her marital unhappiness generally and also her specific unhappiness with the prospective bankruptcy filing. Adams counseled Mariah not to divorce Christopher.

Adams thereafter prepared and submitted a Chapter 7 Bankruptcy Petition on behalf of both the Lancasters and Presque Isle Glass, Inc. A Chapter 7 Bankruptcy is:

> a liquidation proceeding available to consumers and businesses. Those assets of a debtor that are not exempt from creditors are

> collected and liquidated (reduced to money), and the proceeds are distributed to creditors. A consumer debtor receives a complete discharge from debt under Chapter 7, except for certain debts that are prohibited from discharge by the Bankruptcy Code.

U.S. Trustee Program/Department of Justice website.

The Chapter 7 Petition, which Adams prepared and the Lancasters signed, indicated that the Lancasters intended, after filing, to reaffirm their debt to Adams ($4700) and their guarantee of the First Citizens Bank loan ($25,000). Lancaster independently negotiated with the Bank hoping to restructure the loan i.e., stretch out the payments, in exchange for the anticipated $7000 tax refund.

In a letter to Bar Counsel, Adams explained his position on Lancaster reaffirming the debt that his other client, Pritchard, had guaranteed.

> When Lancaster first filed chapter 7 Bankruptcy through my office, it was Mr. Lancaster's instruction to reaffirm the debt to Citizen's bank and to his father-in-law, Pritchard. Lancaster was not then divorced and it was clearly in his best interest to reaffirm the debt. There was no pressure on him by my office to reaffirm. Obviously, I could not have represented Lancaster as bankruptcy counsel in the event he chose not to reaffirm the debt to Pritchard.

Almost immediately the Trustee demanded that the Lancasters turn over to him for the benefit of the unsecured creditors the $7000 refund when received. On April 20, 2001 Adams wrote Lancaster:

> I think we have to <u>withdraw</u> your bankruptcy – It is imperative to refinance the $25,000 Loan over a Longer term.
>
> Snowmachines should be sold.

> Refile after the [refund] is with Citizens and the note is refinanced over Long Term. Must allow min of 90 days after refinancing. Blow away all credit cards.

The following day, the Lancasters sought a second opinion and "decided to switch to" Alan Harding for future counsel. The Lancasters immediately advised Adams of their decision and Adams, plainly miffed, promptly wrote the Pritchards as follows:

> Dear Jim and Martha,
>
> The attached is self explanatory, without further comment. It is given to you simply for the purpose of being alerted to the possible need to obtain legal counsel for yourselves in the Lancaster/Presque Isle Glass bankruptcy. I realize that Mariah is "protecting" your interests, but not to be unkind, I don't think she is fully aware of what is going on. Things seem to have come unglued when I suggested selling the snowmachines.
>
> Attorneys are used to such client re-actions and it is certainly Lancaster's prerogative to seek other counsel. Harding will be free of the interrelationship constraints, and possibly can do something for Lancaster that I could not. I don't mind him seeking a second opinion but it would have been nice to be paid for the first one, or at least discuss the problems. I simply will not represent him again on any issue. He has blown away the best friend he ever had.
>
> Unfortunately, having represented Lancaster, I know too much, all now sealed in concrete. The ethics of our profession further prevent me from representing your interest against him, specifically in recovery of your $25,000 loan guaranty. I highly recommend that you consult with Hal Stewart Jr, who takes ethics and equity as seriously as I do.

> The only interest I have in the bankruptcy outcome is to seek some recovery on my own legal fees for the past year. In pursuing those interests, I am entitled to be heard in a Chapter 7 creditors meeting or to file objections to any chapter 13 workout proposal. To that extent, we both have our own axes to grind, separately, as injured creditors.
>
> Mariah's interests are her own and yours. I can no longer give her grandfatherly advice and with hindsight, probably never should have.
>
> Regards,
> Thomas F. Adams

In due course successor counsel converted the pending Chapter 7 Bankruptcy into a Chapter 13 Bankruptcy which is:

> often called wage-earner bankruptcy, is used primarily by individual consumers to reorganize their financial affairs under a repayment plan that must be completed within three or five years. To be eligible for Chapter 13 relief, a consumer must have a regular income and may not have more than a certain amount of debt, as set forth in the Bankruptcy Code.

U.S. Trustee Program/Department of Justice website.

The following week, Mariah and Christopher separated and soon thereafter Mariah filed for divorce. In November 2001 the Bankruptcy Judge ordered that the Chapter 13 be converted into two separate Chapter 7 cases. New counsel recommended that the two cases be dismissed because the tax refund had been spent (apparently to reduce the First Citizens Bank debt). The Chapter 7 cases were dismissed in January 2002, and the divorce became final in June 2002. In the divorce, Christopher was ordered to pay to Mariah as alimony forty-one monthly

payments of $541 per month. He could make these payments directly to First Citizens Bank if he chose.

After the divorce and before the next bankruptcy filing, Adams sued Christopher for the $4700 in counsel fees that remained unpaid.

On September 9, 2002, Attorney Bernard O'Mara filed a Chapter 7 Bankruptcy Petition for Christopher alone. In the petition Christopher listed, among others, his debts to Adams for $4700 and to First Citizens Bank for $18,500 and did not indicate that he intended to reaffirm either. Adams received a notice for a meeting of creditors scheduled for 9:00 A.M. on October 28, 2002, and attended.

Adams testified that he attended the October 28, 2002 creditors meeting only in his own behalf, i.e., the $4700 debt for his fees. The Court does not accept his testimony on this point. First, Adams signed the "341 Hearing Signature Sheet" as counsel for James Pritchard. Second, in a January 13, 2003, letter to the Board, Adams admitted attending the meeting in two capacities:

> Nor does my appearance before the bankruptcy trustee on behalf of myself and Mr. Pritchard present a conflict of interests. This appearance constituted nothing more than inquiry and disclosure of fact, which is the very purpose of a creditor hearing. No attempt at collection for myself or Pritchard was even suggested, let alone threatened.

And later in the same letter, he wrote:

> I appeared on 10/28/02 before Trustee Richard Cleary at a creditors hearing, both as a personal creditor with unpaid fees of

> approximately $4350, and also for James Pritchard, who had guaranteed a Citizens bank loan for Lancaster in the amount of $25,000. Pritchard ha[d] not received notice of the hearing, so I presumed that he was not listed as a creditor.
>
> My appearance before the trustee was simply to inquire if Lancaster's debt to Pritchard would be reaffirmed.

Again, in his letter of January 13, 2003 Adams wrote:

> "Representation" of Pritchard and myself at Lancaster's most recent bankruptcy creditors hearing revealed neither secrets nor confidences.

Then in a letter dated March 24, 2003 Adams further explained that his:

> "Representation" of Pritchard and myself at the creditors hearing consisted simply of communicating to Lancaster in the presence of his counsel, the very severe consequences of not reaffirming his debt to Citizens Bank, i.e. the creation of a federal tax liability that could not be forgiven in bankruptcy.

From notes produced from his file that he prepared prior to the creditors' meeting, Adams was aware that pursuant to the divorce decree Christopher had been ordered to make monthly alimony payments to Mariah exactly equal to the debt that Mariah was paying to First Citizens Bank, and that alimony was not dischargeable in bankruptcy.

Even though Mariah continued to be liable for and was paying off the loan to First Citizens, Adams appeared at the creditors' meeting and advised Christopher, his lawyer, O'Mara, and the Trustee that if Christopher did not reaffirm the debt to First Citizens Bank, he would advise the IRS of this fact, and the IRS would disallow much of the 2000 tax refund.

> My only purpose was to make them both aware that failure to reaffirm that debt created what I believe to be a significant tax liability for Lancaster that would not be dischargable in bankruptcy. I advised them of the rational for the tax liability was founded on the effective cancellation of an at risk basis which is required to claim the tax loss previously reported. I further advised the Trustee that if the debt to Pritchard was not reaffirmed, it was my duty as a matter of law to report the fact to the Internal Revenue Service. There was no reaction or response from Lancaster's counsel, Lancaster or the Trustee. I interpreted the silence to confirm my assumption that Lancaster's petition did not reaffirm the debt. I notified the Internal Revenue Service of the error the following day.

Indeed, two days after the creditors' meeting Adams wrote the following letter to the Internal Revenue Service in which the lawyer described one of his former clients as "innocent" and the other as "solely responsible," referenced "allegations of fraud" and "mischievous economic conduct" and all but suggested that the Service should consider imposing fraud penalties against Christopher.[1]

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[1] Adams' letter to the IRS is set out in full below:

> October 30, 2002
>
> Internal Revenue Service
> 36 North St
> Presque Isle, Maine 04769
>
> Re: Christopher and Mariah Lancaster, Form 1040, Understated Income Year 2000
>
> Gentlemen,
>
> This office prepared a tax return for Christopher and Mariah Lancaster, which is enclosed (page 1 only).
>
> I was dismissed as legal counsel immediately following the filing of the year 2000 Form 1040, and cannot therefore prepare the necessary 1040X for this client. It has come to my attention that losses claimed on schedule E, for which the client was at risk at the time the return was prepared, no longer qualify as an offset to the parties income. At the time of return preparation, taxpayer was at risk for the full amount of loss claimed, and in his

The Board argues that Adams:

1. should not have counseled one client not to divorce another client, and/or, after doing so, should have immediately withdrawn;
2. incorrectly analyzed the tax refund issue;
3. incorrectly analyzed the right of the Lancasters to retain vis-à-vis the Trustee in Bankruptcy their tax refund;
4. failed to discuss with his clients that he had indicated in their petition that they would be reaffirming their $4700 debt to him;

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simultaneous Bankruptcy (Chap 7) petition reaffirmed the debt which formed the basis for his at-risk qualification.

The original Chapter 7 filing was changed to a chapter 13 by other counsel, and that filing was dismissed, all without timely notice to me. Taxpayer has again filed a Chapter 7 petition and does not now reaffirm the debt that formed the necessary basis for claiming the sub chapter S loss originally reported. To my knowledge Mr. Lancaster never made any payments toward reduction of that debt.

It is my opinion, that Mariah Lancaster qualifies as an innocent spouse in this matter; that it is Christopher Lancaster who was solely responsible for the loss of the Sub S corporation. Allegations of fraud by Mr. Lancaster through his S Corporation, were made in litigation involving Mr. Lancaster, and also a subsequent divorce judgement rendered for Mariah Lancaster, required restitution to Mrs Lancaster, based upon that mischievous economic conduct.

Under 11 USC 523 (a), the current bankruptcy filing does not, of course, result in a discharge of the tax liability that will arise under any voluntary amended return or assessment made by the Service. I offer no opinion as to whether Title 11 section 523(s)1(c), or Title 26 Section 6662 regarding Accuracy Related and Fraud Penalties apply.

Sincerely,
Thomas F. Adams

cc: Bernie O'Mara, Attorney at law

5. inappropriately appeared at Christopher's Creditors' Meeting on October 28, 2002 representing Christopher's former father-in-law (Pritchard); and

6. inappropriately wrote to the IRS on October 30, 2002 repeating allegations of fraudulent conduct by Christopher and characterizing Mariah as an "innocent spouse."

II. CONCLUSIONS

The Court is satisfied that Adams incorrectly analyzed the Lancasters' legal right to flow through to their 2000 personal tax return the $28,000 loss experienced by Presque Isle Glass, Inc.; and that he incorrectly analyzed the Lancasters' right vis-à-vis the Trustee in Bankruptcy to retain any income tax refund to be received while in a Chapter 7 Bankruptcy. Whether these judgments amount to a violation of Me. Bar Rule 3.6(a) ("A lawyer must employ reasonable care and skill . . . in the performance of professional services.") is a much closer question, a question I do not resolve.

The Court is also satisfied that Adams drafted the Lancasters' 2001 Bankruptcy Petition to indicate they intended to reaffirm their debt to him without first discussing that decision with them in violation of Me. Bar Rule 3.4(a)(1) ("Before commencing any professional representation, a lawyer shall disclose to

the prospective client any . . . interest of the lawyer . . . that might reasonably give rise to a conflict of interest . . . .").

Further, Adams violated Me. Bar Rule 3.4(b)(1) ("A lawyer shall not commence or continue representation of a client if the representation would involve a conflict of interest . . . .") by counseling one client not to divorce another client and violated both Me. Bar Rule 3.4(b)(1) and 3.4.(d)(1)(i) ("[A] lawyer shall not commence representation adverse to a former client . . . if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation.") in undertaking to represent James F. Pritchard at Christopher Lancasters' Creditors' Meeting in 2002. That representation was, in fact, related to the subject matter of the former representation and did, in fact, result in the use of confidential information obtained through his prior representation of the Lancasters (i.e., the, at least, "aggressive" deduction taken in the Lancasters' 2000 tax return).

Finally, Adams' letter to the IRS on October 30, 2002 was a violation of Me. Bar Rule 3.6(h) ("Except as permitted by these rules or as required by law or by order of court, a lawyer shall not . . . knowingly reveal a confidence or secret of the client; use such a confidence or secret to the disadvantage of the client; or use such confidence or secret to the advantage of the lawyer or a third person."). Believing

that Christopher was being relieved of a debt to the detriment of his client, Pritchard, and former client, Mariah, Adams used "a confidence or secret," i.e., the fact that Christopher and Mariah had previously claimed a personal deduction for a Subchapter S corporate loss, to "the disadvantage of" Christopher and to the advantage of Adams, Pritchard, and perhaps Mariah. As Adams wrote to the Board on January 13: "My disclosure of fact will indeed cost Lancaster substantial additional taxes, negating [a] refund to which he was not entitled."

For many reasons the disclosure was not authorized by Me. Bar Rule 3.6(b) ("A lawyer who receives information clearly establishing that a client has during the representation perpetrated a fraud upon any person or tribunal shall . . . reveal the fraud to the affected person or tribunal . . . ."). First, the section relates to information acquired during representation, not thereafter. Second, the information must reveal that the client has committed a fraud "during the representation" and here the conduct Adams was complaining about had just occurred.[2] Third, with Mariah continuing to be liable, and Christopher through his alimony obligation indirectly liable, fraud certainly had not been "clearly

[2] Adams argues that the fraud may have occurred during his representations of the Lancasters if they (or perhaps one of them) never intended to pay the debt to First Citizens Bank. Thus, he argues, his license to practice before the IRS was at risk and he had the right to protect his license. The court is unpersuaded that this was Adams' motivation for reporting Christopher to the IRS. Consistent with Adams' plan, the Lancasters used their tax refund to reduce the debt to the Bank and, notwithstanding Christopher's pending bankruptcy, Mariah remained liable to the Bank and was making payments. Further, the divorce court had fashioned an approach that required Christopher to mitigate any loss by Mariah. All this was known by Adams when he wrote the IRS.

established." Fourth, it is doubtful that the IRS is either a "person or tribunal" within the meaning of this rule. Fifth, although he uses the word "fraud" twice, and the phrase "mischievous conduct" and "innocent spouse" once each, Adams does not claim that he was reporting a fraud.

Adams argues that in 2002 he had a legal obligation under the Internal Revenue Code or Regulations to disclose his understanding of the tax consequence of Christopher's bankruptcy filing on the continuing viability of a tax refund Christopher had claimed for the tax year 2000 in a return prepared by Adams in 2001. He could point to no authority in the IRS Code or Regulations to support his view and his expert witness at the hearing could not either.

To be specific, none of the authority cited by Adams or his counsel support the notion that a tax preparer has a continuing obligation to the IRS to report conduct of a former client that might call into question the efficacy of a tax return prepared when the former client was the client. This is especially the case when, in Adams' view, the return was correct when prepared and remained correct as long as he was counsel.

III. SANCTIONS

Because Thomas F. Adams has violated several Bar Rules, the Court believes that discipline is in order. Because he has an unblemished professional record, the Court HEREBY ORDERS that Thomas F. Adams be and hereby is

suspended from the practice of law in Maine for a period of six (6) months commencing July 1, 2005, with that suspension itself being suspended for six (6) months on the condition that Thomas F. Adams attends, before December 31, 2005, twelve (12) hours of continuing legal education approved by Bar Counsel on the subject of professional ethics.

Dated: March 15, 2005

/s/HHD
Howard H. Dana, Jr.
Associate Justice
Maine Supreme Judicial Court